

dated April 28, 1992; deposition of James J. Farmer dated May 19, 1992; deposition of Garrie D. Munk dated May 19, 1992; deposition of Monty Longacre dated August 11, 1992; the exhibits entered into evidence by each party and the pleadings and correspondence contained in the administrative file.

ISSUES

In the Award of February 25, 1994, the Special Administrative Law Judge found that claimant has a 55% permanent partial disability as a result of accidental injury on December 7, 1990 arising out of and in the course of his employment. Fifty percent (50%) of the Award was assessed against the Kansas Workers Compensation Fund and a credit granted for one hundred percent (100%) of benefits claimant receives on a prior claim. By this appeal, respondent requests review of the decision by the Administrative Law Judge on two issues: (1) workers compensation fund liability; and (2) nature and extent of claimant's disability. Arguments on appeal by the Fund and claimant go to these same two issues. The findings by the Special Administrative Law Judge on all other issues are, therefore, approved and adopted by the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) Claimant has a 73.5% general disability as a result of personal injury by accident on December 7, 1990 arising out of and in the course of his employment with respondent.

Claimant worked for respondent as a veterinarian's helper in a feedlot. Claimant came to the United States from Mexico in 1978 and is a permanent resident of the United States. He initially worked as a wheat farm laborer and as a general laborer. In 1984 he went to work for respondent and became helper to the veterinarian. He has a 3rd grade education from Mexico and cannot read, write or speak English.

The injury at issue in this case is the second work related injury to claimant's right shoulder. The first occurred in December of 1989 when he suffered a torn right rotator cuff while working for respondent. Duane A. Murphy, M.D. performed surgery to repair the right rotator cuff on December 21, 1989. As of October 10, 1990, approximately two months before the second injury, Dr. Murphy recommended a 35 pound weight lifting restriction and also recommended that claimant do no work above the shoulder level. Dr. Murphy testified that he expected these restrictions to be permanent.

From the evidence presented, the Appeals Board finds that the second injury occurred when respondent required claimant, with knowledge of the restrictions, to perform work outside those restrictions. After the surgery in December of 1989 claimant returned to work in July of 1990. He testified that he gave Dr. Murphy's written restrictions to Mr. Wilson, the owner of the company. He also testified that Jerry Nye, the veterinarian, was aware of the restrictions.

On December 7, 1990, in spite of the thirty-five (35) pound lifting restriction claimant was required to unload bales of hay weighing 80-90 pounds each. There is a factual dispute regarding whether the foreman, Larry Munk, was aware of claimant's restrictions when he asked claimant to assist with the unloading. The Appeals Board finds most credible claimant's testimony that the foreman was reminded by another employee of the restrictions at the time he initially requested claimant and others to do the work. The foreman apparently indicated he would need a clearance from someone else before he could relieve the claimant from the duties. The foreman thereafter ordered claimant to go

ahead and do the work. Claimant apparently lifted some 65-70 bales before again tearing his right rotator cuff.

Duane A. Murphy, M.D., performed the rotator cuff surgery on claimant's shoulder following each of the two injuries. He testified that he would rate claimant at a 20% impairment of function to the shoulder which he converted, pursuant to AMA Guides, to twelve percent 12% of the body. He also testified that in his opinion each injury was responsible for approximately one-half of the total twenty percent (20%). After the second injury he imposed more severe restrictions than he had for the first injury. After the second injury he reduced the weight limit to 5-10 pounds.

From Dr. Murphy's restrictions two vocational experts testified. On behalf of claimant Mr. Jerry Hardin testified that in his opinion claimant's ability to work in the open labor market has been reduced as a result of the second accident by one hundred percent (100%) and claimant has a one hundred percent (100%) loss of ability to earn a comparable wage. He indicates that he does not believe additional training would be helpful in view of claimant's inability to speak, read or write English.

On behalf of respondent, Monty Longacre testified that in his opinion claimant has a fifty-eight percent (58%) loss of access to the open labor market. He considers the claimant able to earn \$4.50 per hour in the kinds of work he could return to following the second accident. When the \$4.50 per hour is converted to an average weekly wage and compared to the \$567.76 per week wage claimant was earning at the time of the accident, the result is a sixty-eight percent (68%) reduction in wage earning ability.

The administrative law judge concluded that Mr. Hardin's opinion overstated the work disability suffered and he therefore relied upon the opinion of Mr. Longacre. The Appeals Board agreed that Mr. Hardin's opinions overstate the disability. Specifically, the Appeals Board concludes from the record that claimant is not completely precluded from obtaining employment in the open labor market. Nevertheless, the claimant's injury is likely to have a substantial and significant impact on the likelihood he will obtain work. This is especially true in view of his limited educational background and his inability to use the English language.

The loss of access to the open labor market is to be viewed in light of the claimant's education, training, experience and capacity for rehabilitation. Claimant's education, training and experience leave open to him primarily work which will require lifting weights in excess of the 5-10 pound limit. Again, however, the Appeals Board does not conclude from this that he is one hundred percent (100%) unable to obtain employment. The Appeals Board believes that averaging of the hundred percent (100%) by Mr. Hardin and the fifty eight percent (58%) by Mr. Longacre is appropriate. The result here is seventy-nine percent (79%) loss of access to the open labor market. We also believe the \$4.50 wage post injury to be a reasonable basis for calculating the loss of ability to earn a wage. As previously indicated this results in a sixty-eight percent (68%) wage earning loss. It also appears appropriate in the case to average the loss of wage earning ability and loss of access to the labor market factors as authorized in Hughes v. Inland Container, 247 Kan. 407, 422, 799 P.2d 1011 (1990). When those factors are averaged, the result is the 73.5 percent general body disability which the Appeals Board finds to be the appropriate disability for basis of the award in this case.

(2) Kansas Workers Compensation Fund should be liable for one hundred percent (100%) of the benefits paid.

The Kansas Workers Fund argues that it is unfair and contrary to the intent and purpose for the Workers Compensation Fund to allow respondent to be relieved of its liability in this case. The Fund contends that where the respondent has required the claimant to work in excess of known restrictions the respondent should not be, by that act, relieved of liability. The argument made by the Fund is an appealing one. However the unambiguous language of the statute requires that we award one hundred percent (100%) of the liability to the Fund where the respondent has employed the claimant with knowledge of a handicap and where the injury would not have occurred but for that handicap. K.S.A. 44-567. The respondent did have knowledge of claimant's first surgery and subsequent restrictions. Dr. Murphy, the physician who performed both surgeries, testified that in his opinion the second injury would not have occurred but for the first. That first injury and impairment does in our opinion qualify as a handicap pursuant to K.S.A. 44-567. The Appeals Board therefore finds that one hundred percent (100%) of the award in this case is to be paid by the Kansas Workers Compensation Fund.

AWARD

WHEREFORE, the Appeals Board hereby increases the award and an award of compensation is entered in accordance with the findings in favor of the Claimant, Ramon Chavez, and against and the Kansas Workers Compensation Fund for an accidental injury occurring on December 7, 1990.

The claimant is entitled to 65 weeks temporary total disability compensation at the rate of \$278.00 per week, or \$18,070.00, followed by 274.14 weeks of permanent partial disability compensation at the reduced rate of \$257.19 per week, or \$70,506.07, and thereafter permanent partial disability compensation at the maximum rate of \$278.00 per week or until the total amount paid claimant, including the temporary total payments reaches the statutory maximum of \$100,000.00.

As of 7/29/94 there would be due and owing to the claimant 65 weeks of temporary total disability compensation at \$278.00 per week in the sum \$18,070.00 plus 125.14 weeks permanent partial disability compensation at the reduced rate of \$257.19 per week in the sum of \$32,184.76 for a total due and owing of \$50,254.76 which is ordered paid in one lump sum less amounts previously paid followed by 84 weeks of permanent partial disability compensation at the reduced rate of \$257.19, or \$21,603.96 for the period of 2/26/94 to 6/7/97 when the first accident ends. Thereafter, the remaining balance in the amount of \$28,141.28 shall be paid at \$278.00 per week for 101.23 weeks at which time the total amount paid will reach \$100,000.00.

The Kansas Workers Compensation Fund is ordered to reimburse the Respondent and Insurance Carrier for 100% of all sums heretofore paid to or on behalf of the claimant and to pay 100% of the remaining award.

The claimant's contract of employment with his attorney is hereby approved subject to the provisions of K.S.A. 44-536.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against Kansas Workers Compensation Fund to be paid direct as follows:

Satterfield Reporting Services	
Deposition of Jerry Hardin	\$425.65
Connie S. Phillips	
Deposition of Monty Longacre	\$321.60
Susan Maier	
Deposition of Garrie D. Munk	\$191.93
Susan Maier	
Deposition of James Farmer	\$191.93

Other fees have been assessed in Docket No. 160,004.

IT IS SO ORDERED.

Dated this _____ day of July, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc:

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Thomas F. Richardson, Administrative Law Judge

George Gomez, Director